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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 365.

MICHAEL C. SANSONE,
Petitioner,

vs.

UNITED STATES.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

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OPINION BELOW.

The opinion of the Court of Appeals (R. 228-241) is reported at 334 F.2d 287.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 17, 1964 (R. 241). The petition for a writ of certiorari was filed August 10, 1964, and was granted October 26, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the willful delivery of a false tax return, a misdemeanor under Section 7207 of the Internal Revenue Code, is applicable to income tax returns, and if so, is it a lesser included offense within an indictment charging a felony violation of Section 7201 for attempting to evade income tax by filing a false and fraudulent return, so that a defendant thus charged may be entitled under Rule 31 (c), Federal Rules of Criminal Procedure, to a lesser offense instruction with respect thereto.

2. Whether the willful failure to pay one's income tax, a misdemeanor under Section 7203 of the Internal Revenue Code, is a lesser offense necessarily included within an indictment charging a Section 7201 felony of attempting to evade one's income tax by filing a false and fraudulent return, and whether a defendant thus charged is entitled under said Rule 31 (c) to a lesser offense instruction with respect thereto.

STATUTES INVOLVED.

Sections 7201, 7203, and 7207 of the Internal Revenue Code of 1954 (26 U. S. C. §§ 7201, 7203, 7207), Section 1001 of the Criminal Code (18 U. S. C. 1001), and Rule 31 (c) of the Federal Rules of Criminal Procedure are printed in the Appendix to this brief (p. 31). Also set forth therein are former Sections 145 (a), 145 (b) and 3616 (a) of the 1939 Internal Revenue Code.

STATEMENT.

Petitioner adopts the entire statement of facts as set forth in the opinion by the Eighth Circuit Court of Appeals (R. 228-234). The pertinent parts are reprinted below, with the addition of citations to the record:

> "Michael C. Sansone, age 41, after a plea of not guilty, was convicted by a jury of a willful and knowing attempt, in violation of 26 U. S. C., § 7201, to evade and defeat his federal income tax for the calendar year 1957. He had been charged in a 2-count indictment with a violation of this statute for both 1956 and 1957 but was acquitted as to 1956. Judge Harper imposed a $2,000 fine and a 15-month sentence. The defendant appealed.
>
> * * * * * * * *
>
> "The objective facts are not in dispute. Sansone and his wife in 1956 and 1957 lived in a Saint Louis suburb. They filed joint returns for both years. Their 1957 return as filed showed adjusted gross income of $7,585 and taxable income of $2,963. The income reported consisted of Mrs. Sansone's salary as a teacher, sums received by Mr. Sansone from the Department of the Air Force, and his net income as a securities salesman (R. 211). It was stipulated that the taxpayers earned and received these items in 1957 (R. 15). The return disclosed no capital gain or loss and no other income (Exhibit B, R. 211).
>
> "On December 6, 1955, Sansone obtained from House Hunters, Inc. an option to purchase certain land in Saint Louis County. In the following February he exercised this option and a contract for sale was signed. It ran from the vendor to the Sansones. It specified a price of $22,500, payable $17,500 in cash and $5,000 by a purchase money deed of trust on part of the real estate (R. 18-19).
>
> "Sansone at the same time effected a sale of a portion of the land to D-X Sunray Oil Company for

$20,000. Land Title Insurance Co. of St. Louis handled both Sansone's purchase and his sale to Sunray. It closed the two transactions simultaneously and issued the Sansones its check for $2,891.71 (R. 25). This was the amount remaining after appropriate charges and after debiting the Sansones for their $22,500 purchase price and crediting them for the $20,000 Sunray proceeds plus the deed of trust obligation. Both deeds were filed for record on March 21, 1956 (R. 106). This Sunray transaction resulted in 1956 gain which was not reported and which was the subject of the first and acquitted count of the indictment.

"In August 1957 Sansone sold another portion of his tract. This was to Tremarco Corporation and was for a gross price of $27,000 (R. 26). This time Land Title issued the Sansones its check for $21,671.67, representing the net payable to them after vendor's expenses and after payment of the amount due on the deed of trust (R. 26). The deed to Tremarco was immediately recorded (R. 106.) This Tremarco transaction resulted in 1957 gain which was not reported and which was the subject of the second and convicted count of the indictment.

"In summary and to repeat: The defendant purchased a tract of land in March 1956 for $22,500. He promptly sold a portion of the same land for $20,000. In 1957 he sold another portion for $27,000. The gains realized on these respective sales were not reported in the Sansone returns for 1956 and 1957.

"On the question of willfulness the government's case rested primarily upon the testimony of Steve Milosevich, of Revenue Agent John J. Conley, and of the defendant himself, and upon Sansone's own written statement hereinafter mentioned. Because of the difficulty and sensitivity of the issue, we review this evidence in some detail.

"Milosevich was Mrs. Sansone's brother (R. 34). He operated a delicatessen-sandwich shop (R. 33). He

had had some experience as a junior accountant (R. 33). He prepared the Sansones' 1956 and 1957 returns (R. 34). He testified that at the time he prepared the 1956 return he was "not sure" he had information that the Sansones 'had a real estate transaction' but 'I think at that time I may have been aware that there was' one (R. 35). He also said that he prepared the 1957 return from work sheets presented to him by the taxpayers; that there was no information on those sheets pertaining to any real estate transaction other than real estate taxes paid; that again he was 'not sure' whether he knew at the time he prepared the return that the Sansones had sold a piece of property; and that he learned about the real estate transaction through conversations with the Sansones but that he did not 'recall exactly when it was' (R. 36).

"Conley was a special agent with the Intelligence Division (R. 46). He and Agent Purk conferred with the Sansones in May 1960. They then lived in Phoenix, Arizona (R. 47). The agents saw the defendant at his home on three successive days beginning May 3 (R. 47). On May 5 Conley took from the defendant a written statement subscribed and sworn to by Sansone before Conley and denominated an affidavit (R. 74). This was prepared by Conley (R. 74). It was admitted into evidence at the trial over objection (R. 75). The statement twice recites that it was made voluntarily and goes on to state that the affiant understood it, that it was made without threat or promise of immunity, and that he had been advised as to his constitutional rights (R. 76-78). It further recites that the Sansones' returns for 1956 and 1957 (and for 1958) were prepared by Milosevich from work papers compiled by Mrs. Sansone, and

> 'I did not report the 1956 sale in our 1956 joint income tax return because I thought that I was entitled to recover my entire cost before reporting

any sales in my income tax returns. I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so.

'My brother-in-law, Steve Milosevich, knew that we had this real estate and had made several sales, but he did not advise us whether or not to report the 1956 and 1957 sales and the matter was not discussed with him as he merely prepared the returns from the workpaper we gave him in these years' (R. 77).

"Conley testified that he adjusted the 1956 return to reflect the Sunray sale; that this was a short term capital gain; that he determined basis on the part sold by allocating to it a portion of the cost of the entire tract; that this allocation was based on assessed valuations approved by the Sansones on Land Title's closing statement; that he adjusted the 1957 return to include the long term capital gain on the sale to Tremarco; and that he used the assessed valuation method for determining basis of the Tremarco tract (R. 50, 51).

"On cross-examination Conley testified that there are a number of approved methods for apportioning cost; that when Agent Purk made allocations for the later actual payment of the tax he used a method based on front footage (R. 102); that the Sansones produced for the agents all the documents they requested, and made a place available for them in which

to work (R. 87); that, apart from the omission of the sales in the returns, he found no evidence that the defendant attempted to conceal any part of these transactions; that the checks the Sansones received were deposited without concealment (R. 86); that the affidavit did not cover all the discussions had with the Sansones; that they discussed Fish Pot Creek which ran through the real estate (R. 92); that, although the defendant was not present when the affidavit was typed, he had approved a rough draft and was given the opportunity to add anything he wished (R. 94); that he examined the Sansones' bank statements; that their May 1958 statement showed a balance of $9,286.74 (R. 98); and that Sansone had said he wanted to pay his tax (R. 105).

"The defense for the 1957 case is largely concerned with Fish Pot Creek. This stream ran through the Sansone property west of the portions sold to Sunray and Tremarco (R. 89-90). The claim is that Sansone was confronted with large capital expenditures required to correct conditions which the creek had created; that these expenditures would be far greater than any gain realized in the 1957 sale; that any meaningful development was necessarily delayed until the Missouri Highway Commission concluded its plans for improvements to Manchester Road which bordered the property at the south and under which the creek flowed; that Sansone honestly believed that he could wait until these expenditures were ascertained and then determine whether he had any gain on the entire tract; that, although he now knows this was erroneous, it nevertheless was an honest belief which he held when his returns were filed; and that he did not intend to avoid payment of any taxes (R. 112-114).

"In support of this defense Sansone himself took the stand. He testified that his own average income in 1954 through 1956 was around $3,000 to $3,200 annually (R. 127), that he desired to supplement this

by acquiring a piece of property to develop; that he first saw the land in question in the winter of 1955-56 when the creek did not appear unusual (R. 128); that during that winter he learned of the Commission's plans to widen Manchester Road and to straighten the creek (R. 128); that in the spring he found that the stream overflowed and contained raw sewage which created an odor and a mess; that he received many complaints that summer from the mayor (R. 129); that he consulted an architect in late 1956 to inspect the property and to see what could be done (R. 130); that he was repeatedly in touch with the Highway Commission to ascertain their plans but was never able to find out what they were (R. 130); that he did purchase the property and make the sales to Sunray and Tremarco; that he did not report the Sunray sale in his 1956 return because he had paid more for the property than the amount of that sale and thus had not recovered his cost (R. 131); that he was told it would take a minimum of $40,000 to correct the creek; that in 1957 the creek conditions were even worse (R. 133); that he received more complaints from the mayor; that he tried to fix the creek a little himself but was unsuccessful; that he often called the Commission but remained unable to get any definite information from them; that the mayor told him that he did not have the responsibility to fix the creek until the Commission produced its final plans (R. 134-135); that the 1957 return was prepared near the last day for filing in April 1958 (R. 135); that by then the Tremarco sale had been closed; and that he did not report that sale because he had been told he would have to fix the creek, because he felt the forthcoming substantial expenditure on that project was part of his cost, and because he honestly believed he didn't have to report the sales until he had recovered his entire anticipated cost (R. 135); he also testified that he had told Agent Conley of the

coming expenditure on the land; that it was not true, as stated in the affidavit, that he was burdened financially and could not raise money to pay any tax due; and that he was then better off financially than he ever had been (R. 136). He said that he told Conley the affidavit was not complete and that it contained inaccuracies (R. 139).

"An architect testified that Sansone had asked him to inspect the property; that he did so in the fall of 1956; that he quoted Sansone the $40,000 minimum figure; and that he also told him it would be 'stupid' to attempt this project until it was known exactly what the Highway Commission was going to do (R. 115-118). The mayor testified that the creek had been a constant source of complaint; that he talked with Sansone on numerous occasions and told him some corrective measures would have to be taken; that he himself had attempted to accelerate the development in that area; and that he told Sansone he did not expect him to make the permanent improvement until the Commission determined its plans (R. 156-158).

"A consulting engineer also testified for the defense. He, through a corporation, owned an interest in the property immediately across Manchester Road (R. 161). He told of necessary corrective measures which were required, of their cost, of discussing this problem with Sansone, and of the lack of positive information from the Commission" (R. 162-163).

Petitioner would add the following to the foregoing statement: defendant below requested the trial court to include in its charge two instructions on lesser offenses, as follows (R. 195-197):

"DEFENDANT'S REQUESTED INSTRUCTION No. 1

Under the law you may find a defendant guilty of a lesser crime than the crimes charged in the indictment.

A statute upon which a lesser crime is based (Section 7203 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case, reads as follows:

> 'Any person required under this title to pay any * * * tax, * * * who willfully fails to pay such tax, * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor.'

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully failed to pay the correct tax to the United States at the time of the filing of his return, but you further find that the defendant did not willfully attempt to defeat and evade his income taxes by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'

If you have a reasonable doubt as to whether defendant willfuly failed to pay the correct tax when filing his income tax return or returns under any count or counts of this indictment, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

"Defendant's Requested Instruction No. 2

As I have said previously, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged. The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case; it reads as follows:

> 'Any person who willfully delivers or discloses to the Secretary [of the Treasury] or his delegate any • • • return, • • •, • • • or other document known by him to be fraudulent or to be false as to any material matter,'

and then the statute provides for the penalty.

> Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully delivered to the District Director of Internal Revenue at St. Louis, Missouri, his and his wife's federal joint income tax return or returns for the years 1956 and 1957 which were known by him to be fraudulent or false as to any material matter, but you further find that the defendant did not willfully attempt to defeat and evade his income tax by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'
>
> If you have a reasonable doubt as to whether defendant willfully so delivered under any count or counts of this indictment his and his wife's federal joint income tax return or returns which were known by him to be fraudulent or false as to a material matter, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts."

Both of these instructions were refused (R. 196, 197), to which defendant below specifically excepted (R. 140).

The Court of Appeals affirmed the trial court's action as to Defendant's Requested Instruction No. 1 on the ground that a Section 7203 Violation is not a lesser included offense in the instant indictment (R. 239). It affirmed as to the refusal of Defendant's Requested Instruction No. 2 on the ground that Section 7207 does not apply to income tax returns (R. 240).

SUMMARY OF ARGUMENT.

I.

As announced first by this Court in **Spies v. United States**, 317 U. S. 492, the felony of willful attempt to defeat and evade taxes, as now defined by Section 7201 of the Internal Revenue Code of 1954, may contain lesser offenses under the internal revenue laws. Whether or not the offense charged does contain lesser offenses depends primarily on the allegations of the indictment, and where such indictment charges an attempt to evade income tax by filing a false and fr udulent return, the lesser offense of wilfully filing a false and fraudulent return is necessarily included therein. This lesser offense, a misdemeanor under 7207 of the Internal Revenue Code, is applicable to income tax returns; the rule of **Achilli v. United States**, 353 U. S. 373, pertaining to the statutory predecessor of 7207 [Section 3616 (a) of the 1939 Code] no longer applies, because changes in the language and juxtaposition of the statute, and references to it by other sections of the code, make it clear that 7207 includes income tax returns. These changes in the 1954 code also eliminated the overlap between the misdemeanor and felony, which existed under the 1939 Code [Sections 3616 (a) and 145 (b)] and were pointed out in **Berra v. United States**, 351 U. S. 131; the present misdemeanor statute, Section 7207, does not require an intent to defeat or evade taxes as did former Section 3616 (a), so there is no possibility of overlap with the felony statute, Section 7201. In the instant case, the government's own evidence on intent reasonably supports a possible inference that defendant did not intend to defeat or evade his income tax, so under Rule 31 (c) a lesser offense instruction was required as to a possible 7207 violation.

II.

Section 7203 of the Internal Revenue Code, insofar as it proscribes the willful failure to pay a required tax, defines a misdemeanor necessarily included in an indictment charging the felony of attempt to evade income tax by filing a false and fraudulent return. A necessary element in such a felony charge is that some tax must be due and owing, and no tax can be due and owing unless there has been a failure to pay same. **Spies v. United States**, 317 U. S. 492, points out that mere dereliction (failure to pay a tax, failure to file a return, etc.) is but a misdemeanor; it is elevated to the felony by adding the aggravating ingredient of an attempt or intent to defeat or evade the tax. Hence, the instant indictment is a classic example of one containing a lesser included offense: (1) the lesser offense is a necessary element of the greater charge, and (2) the lesser offense is raised to the greater offense by the addition of an aggravating ingredient. The evidence here justified, pursuant to Rule 31 (c), a lesser offense instruction under Section 7203 because if the jury believed defendant's entire written admission it would have necessarily concluded that defendant willfully failed to pay his tax, but intended to pay same at a later date and had no intent to defeat or evade.

ARGUMENT.

I. Section 7207 of the Internal Revenue Code (Title 26, U. S. C.) is applicable to income tax returns, and defines a misdemeanor which necessarily is a lesser included offense in an indictment charging an attempt to defeat and evade income tax by filing a false and fraudulent return. Where the evidence justifies it, an instruction on this lesser offense is required in a prosecution for such income tax evasion.

The problem of lesser included offense instructions in tax evasion prosecutions is of relatively recent origin in this Court. The issue was first suggested in **Spies v. United States**, 317 U. S. 492, where a unanimous court noted, l. c. 497:

> "A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue law."[1]

Thereafter, fate and circumstances seemed always to prevent a resolution of the issue by this Court. First, certiorari was granted in **Dillon v. United States**, 349 U. S. 914 (decision below at 218 F. 2d 97), in which the question was precisely raised, but petitioner died before the matter could be heard and certiorari was accordingly dismissed, 350 U. S. 906. Then came **Berra v. United States**, 351 U. S. 131, again raising the issue; but there, the lesser included offense urged was a violation of 3616 (a) of the 1939 Code (statutory predecessor, with some differences, of the present Section 7207), which was found to exactly overlap the felony section, 145 (b), so that the two re-

[1] The Court referred, by the term "this felony", to former Section 145 (b), Title 26 (Internal Revenue Code of 1939, 53 Stat. 63), statutory predecessor to Section 7201 of the present code.

quired identical elements. Therefore, held **Berra**, the issue was not one of a lesser included offense, but rather one of sentencing: could a felony sentence be imposed under an indictment charging acts which constituted a misdemeanor under 3616 (a) and/or a felony under 145 (b)? If this seemed to open the prison doors for the many tax evaders incarcerated under 145 (b) felony sentences, those doors were soon slammed shut by **Achilli v. United States**, 353 U. S. 373, which succinctly announced that 3616 (a) did not apply to income tax returns. The 1954 Internal Revenue Code then became effective, and **Janko v. United States**, 281 F. 2d 156 (8th Circ.), 164, holding that **Achilli** still applied, upheld the refusal of a lesser included offense instruction; certiorari was sought, but the Solicitor-General confessed error on another point and the case was summarily reversed at 366 U. S. 716. The instant case, therefore, is the first real opportunity for the Supreme Court to resolve the problem, and amplify the pronouncement in **Spies v. United States** that the tax evasion felony "may include one or several of the other offenses against the revenue law."

The instant case is a prosecution under Section 7201. Among the requested instructions sought by defendant below was an instruction that the jury might find defendant guilty of the misdemeanor under 7207 if it found that he willfully filed a false and fraudulent return, but without any "attempt to defeat and evade his income tax" (R. 196-197). The proffered instruction was refused (R. 197).[2] At the outset, it should be noted that

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[2] No discussion will be devoted to the necessity of giving a lesser included offense instruction whenever the offense charged and the evidence presented justify same. This point was not disputed by either the court below or the government. In fact, petitioner adopts, as the law on this matter, the statement of the Solicitor-General in his brief on the merits in *Berra v. United States*, 351 U. S. 131 (No. 60, October Term, 1955):

> "The basic principle to be extracted from the countless cases on the subject, which are mainly in the state courts, is that a

the infirmity found in **Berra v. United States**, supra, no longer exists; the misdemeanor and felony sections do not overlap. Section 7207, which replaced 3616 (a) of the 1939 Code, manifests significant changes in wording which eliminate the problem. Section 3616 (a) read:

> "Whenever any person . . . delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, **with intent to defeat or evade the valuation, enumeration, or assessment intended to be made** . . . he shall be fined not exceeding $1,000.00 or be imprisoned not exceeding one year, or both . . . ."

Section 7207 deleted from 3616 (a) the bold-faced phrase referring to an intent to defeat or evade. It added the words "known by him to be fraudulent or to be false as to any matter" and the word "wilfully" so that it reads:

> "Any person who wilfully delivers or discloses to the Secretary or his delegate any list, return, account, statement or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000.00 or imprisoned not more than one year, or both."

The significance of these changes is that they eliminate any need to prove under section 7207 the existence of a tax deficiency or a specific tax evasion intent. Thus, factual issues to be submitted to the jury under sections 7201 and 7207 of the 1954 Code are no longer identical as they were under sections 145 (b) and 3616 (a) of the 1939

'lesser concluded offense' instruction is *required* where there exists a gradation of offenses, in which the greater offense *alleged* contains the same elements plus some aggravating ingredient not found in the lesser included offense, and where the evidence permits the jury to find the defendant not guilty of the greater offense but guilty of the lesser" (Brief for the United States, p. 16) (Emphasis added).

Code. They no longer "cover precisely the same ground," see **Berra**, supra, 351 U. S. 134. The overlapping in all respects of Section 7207 with Section 7201 can no longer be advanced as a reason for Section 7207's inapplicability to income tax prosecutions and for denial of the lesser offense instruction under Rule 31 (c) of the Federal Rules of Criminal Procedure. The misdeameanor of section 7207 no longer covers precisely the same ground as the felony-evasion offense of Section 7201, and the misdemeanor is necessarily violated in any prosecution in which the means of attempted evasion is the filing of a false return. Depending on how the jury views the other evidence in a case, it may find the filing of a false return either a willful delivery of a return known to be fraudulent under the misdemeanor provisions of Section 7207, or an attempted evasion of income tax with the requisite specific intent under the felony provisions of Section 7201. Unlike **Berra**, the requested instruction here would have raised a separate factual issue under Section 7207, and the question is not simply one of proper sentencing.

In its opinion below (R. 240), the Eighth Circuit followed its prior holding in **Janko v. United States**, 281 F. 2d 156 (reversed on other grounds at 366 U. S. 716 as previously noted), that the statutory replacement of 3616 (a) of the 1939 Code by 7207 of the 1954 Code, including changes in language and juxtaposition of the particular section, did not destroy the applicability of **Achilli v. United States**, supra, and that the new Section 7207 still did not apply to income tax returns. The Solicitor-General, in his brief opposing certiorari in the instant case, did not base his opposition upon this argument, probably because he has already been committed to the contrary view. In opposing certiorari in **Dillon v. United States**, No. 629, October Term, 1954, the Solicitor's Brief (Foot Note 3, page 9, Brief for the United States in Opposition) conceded:

> "Although the holding of the Court below will to some extent impede the Government's policy of proceeding against minor offenders under the provisions of Section 3616 (a), the issue is one of steadily diminishing importance since Section 3616 (a) has been replaced by Section 7207 of the Internal Revenue Code of 1954 which, as the Court of Appeals agreed (Pet. 27), **clearly has application** to income tax returns." (Emphasis added.)

Your petitioner submits that the Solicitor's view is clearly the correct one, and that the Eighth Circuit's reasoning improperly ignores the innovations incorporated in the 1954 Code.

In this regard, the most compelling consideration is the reference to Section 7207 in other sections of the 1954 Code, indicating plainly that Congress intended that 7207 should apply to income tax returns. Section 7207 is specifically mentioned in Section 6013 (b) (5) (B) entitled "Joint Returns of Income Tax by Husband and Wife" for the purpose of clarifying the income tax criminal liabilities of spouses. The clear wording of Section 6013 (b) (5) (B) presupposes criminal liability for fraudulent income tax returns under Section 7207.[3]

Secondly, the location of Section 7207 in the 1954 Code in contrast to the positioning of Section 3616 (a) in the 1939 Code bolsters the conclusion that Section 7207 applies to income tax returns. Section 3616 (a) appeared under the heading "General Administrative Provisions" in

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[3] That this is even the Commissioner's view is seen in his Regulation 1:6013-2 (e) (2), reading as follows:

> "(2) For the purposes of Section 7206 (1) and (2) and Section 7207 (relating to criminal penalties in the case of fraudulent returns) the term 'returns' includes a separate return filed by a spouse with respect to a taxable year for which a joint return is made under Section 6013 (b) after the filing of a separate return."

the 1939 Code among several statutes covering a multitude of subjects other than income taxes. Section 7207 appears in the 1954 Code in Part I of Subchapter A of Chapter 75, entitled "Crimes, Other Offenses, and Forfeitures." It thus appears from the legislative scheme of the 1954 Code that all of the penalty measures in Part I of Subchapter A of Chapter 75, incorporating Section 7201 and other income tax crimes, including Section 7207, were intended to apply to any and all taxing provisions unless otherwise specifically indicated.

Finally, the specific change of wording in 7207, so that it no longer overlaps the felony statute, eliminates the reasoning and purpose of the **Achilli** holding. There, under the 1939 Code in which the 3616 (a) misdemeanor exactly overlapped the 145 (b) felony, this Court concluded that it would be ridiculous to contend that the most common method of tax evasion (filing a false return) might be a misdemeanor while lesser important methods of evasion must be felonies; hence 3616 (a) could not have been intended to apply to income tax returns. Now, however, Section 7207 is confined to wilfully filing a false or fraudulent return **absent** any attempt to defeat or evade the tax; it, therefore, can be clearly applicable to income tax returns without creating the incongruous situation referred to by Mr. Justice Frankfurter in **Achilli**.

The Solicitor-General, in opposing certiorari in the instant case, contends that filing a false and fraudulent return in violation of 7207 is not a necessarily included element of attempting to defeat or evade taxes as proscribed by 7201 (Brief of the United States in Opposition, P. 7). Other means, it is argued, can be used to attempt to evade taxes, such as failure to file any return plus "wilful conduct to conceal". The Solicitor then concludes that **every** violation of Section 7201 does not necessarily include a 7207 violation. What this argument overlooks is that in the instant case the specific charge **does** include

the filing of a false and fraudulent return. The very words of the indictment read (R. 2):

> "That . . . Michael C. Sansone . . . did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1957, by filing and causing to be filed . . . a false and fraudulent joint income tax return. . . ."

Regardless of what other conceivable methods might be used to attempt to evade taxes, in this case Sansone is specifically charged with attempting to evade his taxes by filing a false and fraudulent return. Clearly under this indictment the lesser offense embodied in Section 7207 is included in the charge; in fact, if one strikes out the phrase "attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1957," the remaining language of the indictment (with grammatical adjustments) charges precisely a violation of Section 7207. A clearer example of a lesser included offense is scarcely imaginable.

The Solicitor's argument further overlooks the plain implications of **Berra v. United States**, supra, that it is the indictment which constitutes the charge in any given case and which sets forth the facts which must be proven, while the statute merely fixes the penalties. Even the government's own arguments in the **Berra** case strongly contended that the allegations of the indictment are determinative of the offense charged, rather than the provisions of any statute:

> "In our view it was not the jury's function to decide which statutory provision was violated by petitioner, but only to determine whether the allegations of the indictment had been proven beyond a reason-

able doubt." (Brief for the United States, pp. 11-12, Berra v. United States, No. 60, October Term, 1955.)

Certainly it is clear, in deciding what offense is charged, that the instant indictment alone governs.[4] Thus, that in some other case at some other time, some other defendant might be charged with a tax evasion under 7201 which does not involve a false and fraudulent return, is all totally irrelevant. In the instant case, under the instant indictment, a 7207 violation was "necessarily included in the offense charged" within the meaning of Rule 31 (c), Federal Rules of Criminal Procedure, and a jury instruction to that effect should have been given.

The inconsistency of the government's position is further demonstrated by a reference to the Solicitor's brief in **Achilli v. United States**, supra (Nos. 430 and 834, October Term (1956). There the government hastened to argue that Section 1001, Title 18 (a general provision prohibiting false and fraudulent statements to any governmental agency) was clearly a lesser included offense in a tax evasion charge (Brief for the United States, pp. 30-31, in **Achilli**, supra):

> "It has been held that this offense, being but an 'incidental step in the consummation of the completed offense of attempted defeat or evasion of tax by means of a false and fraudulent return', is an offense included within the crime charged by the standard Section 145 (b) indictment form used in the instant case."

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[4] In that same brief in the *Berra* case, the Solicitor quoted with approval from *Williams v. United States*, 168 U. S. 382, 389:

> "It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force" (Brief for the United States, No. 60, October Term, 1955).

The footnote on Page 31 of that brief could virtually be adopted by the present petitioner as his brief on this point:

> "26. The determination of whether one offense is included in another rests upon a comparison of the elements of the two crimes. **Berra v. United States**, 351 U. S. 131, 133-134; cf. **Stevenson v. United States**, 162 U. S. 313. Here the allegation that petitioner filed a false and fraudulent return with the Collector of Internal Revenue (obviously a matter 'within the jurisdiction of [a] department or agency of the United States') charges a violation of Section 1001. The aggravating ingredient present in Section 145 (b) but lacking in Section 1001, is the willful attempt to evade the tax."

Thus we have an interesting paradox: in **Achilli**, while attempting to convince the Court that former Section 3616 (a) was not applicable to income tax returns, the government urged that filing a false and fraudulent return (under 18 U. S. C. 1001) **was** a lesser included offense in a charge of income tax evasion by false and fraudulent return. At present, however, Section 3616 (a) having been replaced by 7207 (which clearly is applicable to income tax returns, by the Solicitor's own prior admission), the government contends that filing a false and fraudulent return (under either Section 7207 or 18 U. S. C. 1001) is **not** a lesser included offense in an income tax evasion prosecution.

This inconsistency, petitioner submits, illustrates the inadequacy of the government's present position. Certainly the **Achilli** argument was correct, in that filing a false and fraudulent return is an obvious lesser included offense in any indictment charging tax evasion by a false and fraudulent return.

The only remaining consideration is whether the evidence of record requires the lesser offense instruction, for petitioner does not quarrel with the Solicitor's contention that "No instruction should be given on a lesser offense where there is no evidence to justify it" (Brief for the United States in Opposition, P. 6). In applying this principle, one must remember that the element which elevates a 7207 misdemeanor to a 7201 felony is an intent to defeat or evade taxes; no additional overt act is required. Thus, here the only overt act charged is willful filing of a false and fraudulent return; whether this is a misdemeanor or felony depends entirely on Sansone's intent; did he attempt and intend to defeat and evade his taxes? The main government evidence on the intent issue was the sworn statement of the defendant, the pertinent part of which reads as follows (R. 77):

> "I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. **It was my intention to report all sales in a future year and pay the tax due.** I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so" (Emphasis added).

Certainly if this constituted the government's evidence of intent (and indeed little, if anything, else appears in the record on this point), it at least raised a legitimate factual issue as to whether Sansone really intended to defeat and evade his taxes, or merely wanted to postpone payment to a later date. Moreover, substantial uncontroverted evidence was presented to refute any intent to defeat or evade taxes—evidence to which the court below conceded "there is some force" (R. 238). This evidence

is fairly summarized in the opinion below (R. 238, 239), and includes such facts as:

(1) Defendant made no attempt to conceal the taxable transactions and avoided use of straw parties (R. 21, 86);

(2) Federal documentary stamps in the proper amounts were affixed to all deeds (R. 21, 22, 31);

(3) All deeds were promptly recorded (R. 20, 86);

(4) Defendant reasonably anticipated future capital expenditures on the property which might use up all the gain he made (R. 131, 135);

(5) There was no consistent pattern of under-reporting income, and except for the two isolated instances of capital gain (for which he was indicted), defendant's returns were correct (R. 47, 50, 52).

This evidence, added to the exculpatory features of defendant's sworn statement, certainly created a substantial question as to the element of intent and justified the requested lesser offense instruction. It is quite conceivable that a properly charged jury might have found that Sansone did, in fact, willfully file a false and fraudulent return, but neither attempted nor intended to evade any tax, it being his intention to report all sales in a future year. Indeed, it was defendant's principal contention at the trial that, although under the law he should have reported the sale and capital gain, he was under the mistaken impression that he could delay such report until all of his anticipated capital expenditures had been ascertained (R. 114, 115). As the jury was actually charged, they could either disbelieve the **entire** defense and convict of the felony, or believe the **entire** defense and acquit completely. Not available to the jury was the middle ground, whereby they might have believed Sansone's sworn written admission ("I knew I should have reported the 1957 sale"), and also believed that **part** of

the defense showing that Sansone reasonably anticipated large capital expenditures on the property and intended to pay any taxes owing after these expenditures had been ascertained; under such a finding, of course, only conviction of a 7207 misdemeanor could result. Thus the failure to give the lesser offense instruction prevented a separate jury consideration of the various elements of defense, by compelling the jury to either accept or reject the proffered defense in its entirety, and acquit or convict of the felony accordingly—all without any consideration of the possibility that there lay therein the elements of the misdemeanor.

II. **Willful failure to pay a tax when due, a misdemeanor under Section 7203 of the Internal Revenue Code, is necessarily included in an indictment charging attempt to defeat and evade income tax, and a lesser offense instruction for same is required where the evidence justifies it.**

The other instruction offered by defendant and refused by the trial court pertained to a violation of Section 7203 as a lesser included offense in the felony charged, and charged that the jury, if they found that defendant "willfully failed to pay the correct tax" but did not attempt to defeat and evade his income taxes by filing a false and fraudulent return, should find defendant guilty of the misdemeanor under Section 7203 (R. 195-196).

Section 7203 of the 1954 Internal Revenue Code (Title 26, United States Code) is substantially the same as its statutory predecessor, Section 145 (a) of the 1939 Code. It lists various omissions any of which, if willfully done, constitutes a misdemeanor, including failure to make a return, failure to pay a required tax, failure to keep required records, and failure to supply information. Petitioner submits that, insofar as it proscribes the willful

failure to pay a required tax, Section 7203 clearly defines a lesser offense necessarily included in the 7201 felony of attempt to defeat and evade taxes.

The unquestionable authority on this issue is **Spies v. United States**, 317 U. S. 492 (cited with approval by the government in its Brief for the United States in Opposition, p. 7). After noting that the felony of attempting to evade taxes "may include one or several of the other offenses against the revenue laws" (317 U. S. at p. 497), the **Spies** opinion then elaborated with specific examples. The willful but passive neglect of duties under 145 (a), this Court observed, was a mere misdemeanor; but if combined with some affirmative act evidencing an intent to evade (such as keeping a double set of books, or making false entries, or concealing assets), the crime is lifted to the degree of felony under 145 (b) (now 7201) of the Code. In other words, as the opinion pointed out, in defining the felony "Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors", 317 U. S. at p. 499. This, of course, defines **exactly** a greater offense and a lesser included offense under the traditional and uncontroverted authorities on the subject; as the solicitor argued in his brief opposing certiorari in the instant case, "The greater offense must contain the same elements plus some aggravating ingredient not found in the lesser included offense" (Brief of the United States in Opposition, p. 6). Here the basic dereliction, failure to pay a correct tax (or in **Spies**, the failure to file a return) is elevated to a felony when the "aggravating ingredient" of an attempt to evade is added. Section 145 (a) and 145 (b) in the **Spies** case, and Section 7203 and 7201 in the instant case, are thus classic illustrations of a gradation of offenses, where the lesser offense plus some additional element make up the greater offense, see **Dynes v. Hoover**, 20 How. 65, 79-80.

In its opinion below (R. 239-240), the Eighth Circuit attempted to justify refusal of the instruction on the ground that the felony charge embodied an affirmative act (filing a false and fraudulent return) and did not rest on "something less than positive," such as a mere failure to file a return. But this would be true in every 7201 prosecution, for as the **Spies** case points out, **some** affirmative act is always necessary to make out a felony. Hence under the reasoning of the Court below, a 7203 lesser included offense instruction could never be authorized in a 7201 prosecution, yet that Court admitted in **Foley v. United States**, 290 F. 2d 562, 568-569, and in its instant opinion (R. 239) that there may be certain instances where a defendant **is** entitled to a lesser included offense instruction under 7203. It is submitted that the attempt to make Sections 7203 and 7201 mutually exclusive, because they respectively involve omissions versus commissions, is totally inconsistent with the **Spies** holdings.[5]

In its brief opposing certiorari, the government argues that the failure to pay a tax is not necessarily involved in every 7201 felony prosecution:

> "If a taxpayer is guilty of an act of **commission**, e. g., filing a false return in a wilful attempt to evade his taxes, he is guilty under § 7201 although he has not violated § 7203" (Brief of the United States in Opposition, p. 7).

Petitioner submits that this premise is totally erroneous, and that **every** attempt to evade taxes which is a violation of Section 7201 must necessarily include a failure

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[5] For example, if a defendant were charged with a 7201 felony, for failing to file a return plus the positive act of concealing his assets, certainly under *Spies* the lesser included offense of failing to file a return under 7203 would be involved. It would not be excluded as a lesser offense merely because it involves a mere omission, while the felony charge contained the affirmative act of concealment.

to pay the correct tax a violation of Section 7203. It is axiomatic, in tax evasion prosecutions, that an essential element for conviction is that **some** tax be due and unpaid; no defendant can be convicted under 7201 unless it is shown that some portion of the lawfully due tax is owing. This is the unqualified rule, without exception, throughout the various circuits; **Holt v. United States**, 272 F. 2d 272, 279 (9th Circ.); **Elwert v. United States**, 231 F. 2d 928 (9th Circ.); **United States v. Augustine**, 189 F. 2d 587 (3rd Circ.); **United States v. Schenck**, 126 F. 2d 702 (2nd Circ.); **Gleckman v. United States**, 80 F. 2d 394 (8th Circ.). See also Mertens, **Law of Federal Income Taxation**, Vol. 10, Section 55.37.

Furthermore, as the foregoing authorities agree, this rule is applicable regardless of how fraudulent a defendant's tax return may be, or how flagrant his concealment or other willful conduct may be.. Plainly and simply, no offense under Section 7201 is committed unless there has been a failure to pay the correct tax when due. This, it is submitted, is emphatic repudiation of the government's argument, and patently demonstrates that a failure to pay a given tax in violation of 7203 is necessarily included in any charge of attempting to evade that tax in violation of 7201. It is impossible to be charged with the latter without also being charged therein with the former.

It is submitted that the foregoing analysis of the interrelation of Section 7201 and 7203 establishes the two legal factors which are prerequisite to a lesser included offense instruction under appropriate indictment and proof, i. e., a gradation of offenses in which an aggravating ingredient added to the lesser offense elevates it to the greater offense, and a necessary commission of the lesser offense in every commission of the greater. All that remains for consideration is whether the evidence in the instant case justified the 7203 instruction. This issue is primarily concerned with the intent of defendant as proven by the

evidence: was it such that the jury might reasonably infer willfulness as to the failure to pay the correct tax, yet reject any willfulness in regard to an attempt to defeat or evade the tax? To answer this, one need look only to defendant's sworn statement given to the internal revenue agent (R. 75-78), which constituted the government's primary proof of intent. In this statement, defendant confessed that "I knew that I should have reported the 1957 sale" but added that he intended to report it in a future year and then pay the tax due, that he did not intend "to evade the payment of our proper taxes," and that he intended to pay any taxes due when he "was financially able to do so" (R. 77). Thus, this admission clearly supports a willful failure to pay, but actually denies a willful intent to evade or defeat. The willfulness is directed only toward a then-present failure to pay the tax, but is specifically denied as to any evasion or defeat of the tax. Under the circumstances, and in the total absence of any badges of fraud (double sets of books, concealment, cover schemes, etc.), a jury believing this admission in its entirety could well find defendant guilty only of the 7203 misdemeanor.

It is true, as the Solicitor-General points out (Brief of the United States in Opposition, p. 8, footnote 3), that Sansone, in his trial testimony, expressly denied having made the above statements to the agent (R. 138, 139). But this was a matter for the jury to decide; they may well have chosen to believe the entire statement, and disbelieve defendant's trial testimony repudiating the statement, in which event a 7203 conviction would have been proper. Certainly, if the verdict of conviction is any criterion, they did believe at least part of the statement (i. e., he knew he should have reported the 1957 sale) and disbelieved substantially all of Sansone's trial testimony; whether or not they believed the **entire** statement (i. e. exculpatory of the felony, but incriminating as to the misdemeanor—

that he intended to pay the tax due in a future year) can never be ascertained, in the absence of a lesser included offense instruction.

In any event, it is clear from the record that various combinations of jury conclusions and inferences were possible; it is equally clear that some of these combinations, had the jury been properly charged as to lesser included offenses, might have resulted in conviction only of the 7203 misdemeanor. Therefore, it must be concluded that the evidence did in fact justify a lesser offense charge, and that the trial court erred in refusing to give same.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the Court below be reversed, and the cause remanded for a new trial.

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APPENDIX.

Statutes.

Internal Revenue Code of 1954 (Title 26, U. S. C.):

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Sec. 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Sec. 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be

fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

Criminal Code (Title 18, U. S. C.):

Sec. 1001. Statement or Entries Generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure:

Rule 31. Verdict.

. . .

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or for an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Internal Revenue Code of 1939 (former Title 26, U. S. C.):

Sec. 145. Penalties.

(a) Failure to file returns, submit information, or pay tax. —Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax

imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. —Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Sec. 3616. Penalties.

Whenever any person——

(a) False Returns. —Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

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he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.